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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of)
)
Amendment of the Commission's) RM-8577
Rules to Preempt State and Local)
Regulation of Tower Siting for)
Commercial Mobile Services Providers)

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FEDERAL COMMUNICATIONS COMMISSION
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COMMENTS OF COX ENTERPRISES, INC.

Cox Enterprises, Inc. ("Cox"), by its attorneys, hereby submits its comments in response to a Petition for Rulemaking filed by the Cellular Telecommunications Industry Association ("CTIA") on December 22, 1994.^{1/} In its Petition, CTIA requests that the Federal Communications Commission (the "Commission" or "FCC") initiate a rulemaking to preempt state and local tower site regulation that directly or indirectly impedes the build-out of an efficient Commercial Mobile Radio Service ("CMRS") infrastructure. Cox supports this request because it is essential that the FCC establish general site acquisition and zoning policies that guide state and local governments in exercising their authority.

I. INTRODUCTION

As a Personal Communications Services ("PCS") licensee and a near term competitor in the wireless marketplace, Cox recognizes that the resolution of site location and zoning issues at the local level will be critical to the build-out of its broadband PCS system. Although the deployment of Cox's PCS service is substantially cable-based, Cox will be required to locate sites for cells or microcells in areas where cable plant is unavailable or

^{1/} See Cellular Telecommunications Industry Association's Petition for Rulemaking (filed December 22, 1994) (hereafter "CTIA Petition").

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where it is unable to negotiate transport arrangements with other cable operators. As such, Cox supports the establishment of a siting process that appropriately accommodates the overriding federal interests in establishing competition in the mobile services marketplace.

Site acquisition issues cannot be resolved satisfactorily unless all interested parties operate within a common framework for resolving disputes over the reasonableness of a zoning decision or process. The Commission must establish guidelines that: (1) recognize state and local government involvement in siting determinations; and (2) permit FCC review to ensure that federal policies promoting competition in the CMRS marketplace are not undermined in the zoning and siting analysis.

II. FEDERAL PREEMPTION OF UNREASONABLE STATE AND LOCAL SITING AND ZONING REGULATION IS REQUIRED TO ENSURE A COMPETITIVE MOBILE COMMUNICATIONS MARKETPLACE.

Pursuant to the Omnibus Budget Reconciliation Act of 1993, Congress explicitly recognized that, with the entry of new CMRS competitors, state regulation of CMRS providers is unnecessary and even contrary to the goal of encouraging mobile services competition. Accordingly, the legislation preempted state and local CMRS entry and rate regulation to prevent states from adopting regulations that undermine federal efforts to promote competition in the CMRS marketplace and to provide a uniform regulatory framework for CMRS build-out and service delivery.^{2/}

The acquisition of sites is critical to the build-out of PCS and other CMRS systems. With the advent of four or more new CMRS providers in each wireless market,

^{2/} See Omnibus Budget Reconciliation Act of 1993, Section 332(c)(3)(A), 47 U.S.C. § 332(c)(3)(A) (1993).

CTIA's concern that the industry will confront significant difficulties in acquiring the large number of sites necessary to support competing CMRS systems is justified. Estimates have indicated that 2,000 new sites per major metropolitan area will be needed by PCS, ESMR and cellular operators over the next several years.^{3/} Emerging service providers will be faced with unmatched challenges to deploy their wireless systems while state and local governments will be called upon to manage and promote their growth by streamlining their review procedures.

The intense siting and zoning pressures that will be placed on state and local authorities should be of concern to the FCC in achieving its national objective to promote competition in the CMRS marketplace. The Commission must establish enforceable guidelines that effectively address these issues and minimize the potential for conflict or delay. Moreover, the Commission must act promptly, before CMRS providers find that they are unable to provide service in specific markets where state and local regulation block service deployment. Unreasonable and unduly restrictive state and local regulation will only serve to benefit incumbent mobile services providers at the expense of new entrants. Federal preemption of unreasonable state and local siting and zoning regulation is required to ensure a competitive mobile communications marketplace.

III. THE COMMISSION MUST ENSURE THAT CMRS PROVIDERS HAVE ADEQUATE REDRESS FOR UNJUSTIFIED DENIALS OF ACCESS.

The success of all CMRS/PCS providers will depend on their ability to provide high quality service within a broad coverage area. Customer surveys have indicated that wide

3/ See Greg Sweet, Carriers Face Major Challenges when Acquiring Wireless Sites, Radio Communications Report at 63 (January 30, 1995).

area service coverage is highly valued by mobile telecommunications users. Coverage that compares unfavorably with cellular incumbents will not be competitive. Accordingly, the Commission must establish general principles for state and local siting and zoning regulation to ensure that Congress's goal of encouraging competition in the CMRS marketplace is recognized and incorporated in state and local site and tower determinations.

As indicated by CTIA, the Commission has already established standards for preemption when burdensome state regulation can halt the development of new services. In the regulation of satellite earth stations, for instance, the Commission preempted local zoning regulation that is not supported by clearly defined health, safety or aesthetic objectives, or is deemed to be an "unreasonable limitation" on land use. The Commission must establish a similar national siting policy to limit the extent to which state and local governments can block the deployment of competitive CMRS systems.

The Commission should initiate a rulemaking to examine the current siting process and solicit comments addressing alternatives, such as specific guidelines for state and local site and zoning regulation. The general process for considering site acquisition requests should ensure that CMRS providers are afforded adequate due process protections in locating sites and obtaining necessary authorizations. Siting guidelines should identify the scope of "reasonable" restrictions and permit state and local authorities to make siting determinations only after considering national objectives of promoting competition in the CMRS marketplace.

Maintaining the status quo will not promote the competitive deployment of CMRS. Subjecting CMRS providers to widely divergent state regulation will deter the growth of competition in the nation's most densely populated areas where concerns regarding

congestion and aesthetics are most acute.^{4/} Moreover, unless CMRS providers are afforded opportunities to challenge unreasonable restrictions before the Commission, efforts to encourage competition in the wireless marketplace could be thwarted.

No better example of unduly restrictive state regulation can be found than state and local decisions denying access based on unjustified RF emissions concerns. Regardless of the fact that the Commission has adopted safety standards for evaluating the environmental effects of RF radiation, state and local authorities continue to restrict the deployment of CMRS based on their own speculation about relevant health risks.^{5/} States simply must not be permitted to block CMRS entry when the proposed service complies with federally-

4/ California's site acquisition and permit process, for instance, is both complex and time-consuming. Service providers are required to obtain all relevant permits from local authorities prior to filing for authorization with the Commission Advisory and Compliance Division of the California Public Utilities Commission. Applicants must satisfy specific public notification requirements and must respond to additional public protests even after all local permits have been granted. Service providers can request preemption of local regulation only after presenting local authorities with two or more alternative sites and only after establishing that it is unlikely that local authorization will be granted. See Public Utilities Commission of the State of California, General Order 159, Rules Relating to the Construction of Cellular RadioTelephone Facilities in California, Decision 09-03-080, R. 90-01-012 (adopted March 28, 1990, released March 28, 1990). Under these rules, resolution of siting issues can extend to up to a year from the date on which applications are accepted as complete. Unless service providers can be assured of an efficient and prompt permitting process, the Commission's vision of a ubiquitous, competitive CMRS infrastructure will remain unrealized.

5/ The Commission's Rules specify the use of the American National Standard ANSI C95.1-1982, "Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 300 kHz to 100 GHz" for evaluating the environmental impact of RF radiation. See 47 C.F.R. § 1.1301, et seq.

mandated safety guidelines.^{6/} In such instances, limited preemption of state and local regulation is required.^{7/}

Many companies, including Cox, have expended large amounts of capital in the on-going PCS auction to establish a competitive wireless service. In addition to bidding on its own in several markets, Cox's subsidiary, Cox Communications Wireless, Inc., is also a partner in WirelessCo, an entity currently bidding on a significant number of PCS licenses.^{8/} Unreasonable state or local regulation that blocks nationwide build-out of new CMRS systems could eviscerate any potential public benefits the systems might have. Commission and industry efforts to create a competitively robust mobile services market can be undermined by unduly restrictive state and local regulation that disserves the public interest and ignores Congressional competitive mandates.

IV. CONCLUSION

Cox requests that the Commission initiate a rulemaking to establish national policy guidelines and procedures for state and local siting and zoning determinations. Only

^{6/} See e.g. Remarks of Commissioner Rachelle Chong to the Cellular Telecommunications Industry Association, New Orleans (February 1, 1995) (noting that even if RF emissions fall "well within" the safety standards set by ANSI, unjustified health concerns can be an impediment to the siting process).


^{7/} See Petition for Further Notice of Proposed Rulemaking filed by the Electromagnetic Energy Association seeking preemption of local RF radiation emission standards that are inconsistent with FCC-approved RF levels (ET Docket No. 93-62, filed December 22, 1994).

^{8/} Numerous companies have joined similar partnerships or joint bidding arrangements having recognized that ubiquitous coverage and high quality service are necessary to compete with incumbent cellular service providers.

by setting clear standards for expeditious consideration of site acquisition requests, and guaranteeing due process at the local, state and FCC levels, will the Commission ensure that its competitive goals are considered throughout the site acquisition and permitting processes.

Respectfully submitted,

COX ENTERPRISES, INC.

A handwritten signature in cursive script, appearing to read "Laura Phillips", written over a horizontal line.

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February 17, 1995

CERTIFICATE OF SERVICE

I, Vicki Lynne Lyttle, a secretary at Dow, Lohnes & Albertson, hereby certify that on this 17th day of February, 1995, I caused a copy of the foregoing Comments of Cox Enterprises, Inc. to be served by first-class mail, postage prepaid, to the following:

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